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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 435

JOHN LEE,

Petitioner,

vs.

EULA LEE MATTHEWS FINLEY, and
HENRY P. WILLIMON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT OF PETITION.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 369

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To the Honorable Fred A. Vinson, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

(Emphasis ours when used in this Petition.)

Your Petitioner, John Lee, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered in this cause on May 24, 1951, which judgment affirmed an order of the Superior Court of Cook County, Illinois, denying the verified petition of the petitioner entered after the said petition had been stricken without the hearing of any evidence; and from the order entered by the Supreme Court denying a petition for rehearing duly filed.

The complete Transcript of Record in this cause, including the proceedings in the Supreme Court of Illinois, is furnished herewith in accordance with Rule 38 of the Rules of this Court. The decision of the Supreme Court of Illinois appears in the record (Tr. 76-78). The decree in Partition was entered June 20, 1950, in the Superior Court of Cook County (Tr. 15-17), the decree of sale was entered June 27, 1950 (Tr. 17-19) and the Order denying the Motion and Petition of John Lee, Petitioner, to vacate the decree in partition and decree of sale was entered August 1, 1950 (Tr. 19-20).

SUMMARY STATEMENT.

(1) This was an action brought under a special statute governing all proceedings for the partition of real estate. (Ill. Revised Statutes 1949, chapter 106.) Paragraph 1 provides that proceedings under this statute are to be commenced by Complaint in Chancery. The proceedings in this case were commenced by a document labeled "Partition Proceedings" (Tr. 1-7). Paragraph 5 provides the form of the complaint; Paragraph 6 provides the persons who are to be made parties to the proceedings; Paragraphs 7 and 8 specify certain facts to be alleged in the complaint; Paragraph 15 specifically provides the kind of judgment to be entered; Paragraph 31A specifically provides for proceedings to bring in new parties where death occurs to one of the parties during the pendency of the suit; Paragraph 40 provides how the costs are to be apportioned by the decree; Paragraph 43 provides when the Civil Practice Act shall apply to the partition proceedings.

(2) January 12, 1949, when this suit was filed, Allen Crossley was the only defendant named herein and John Lee at no time was made by amendment to the partition

proceedings a party in the same and did not have an opportunity to file any answer or litigate his interest in the Real Estate because the said Allen Crossley, deceased, was alive and the interest of John Lee did not arise until the death of Allen Crossley, December 12, 1949. No summons was at any time served on any defendant except Allen Crossley, nor was any summons issued for John Lee (Tr. 8).

(3) The summons was served on Allen Crossley, January 17, 1949. (Tr. 9.) As shown by the verified petition of John Lee filed July 20, 1950, more than 18 months after the beginning of the suit (Tr. 56-64), the property in question was purchased by Allen Crossley, an elderly man, who used the building as his residence until his demise. John Lee, the nephew of Allen Crossley, deceased, has been residing in the premises as his home with his uncle until and after the death of the uncle, and was so residing at the time the suit was begun. Both Crossley and Lee were persons of meager learning and had come to Chicago to make their home. Neither was familiar with court proceedings, Crossley being unable to read or write. He was unmarried but was thrifty and industrious and had saved a small amount of money which he had given to an attorney for the purpose of purchasing the little house at 4612 Dearborn Street, Chicago, Illinois, to be used as his home.

(4) Upon the death of Allen Crossley, December 12, 1949, John Lee was left the property by the Last Will and Testament of the said Crossley. It appears that during 1949, while the suit was pending by partition proceedings, Crossley was represented by one Attorney Richard A. Harewood (Tr. 9), whose appearance was filed February 3, 1949, and who withdrew as attorney October 7, 1949 (Tr. 13) for Crossley, and substituted one Benjamin G. Clanton, who filed his appearance for Crossley, October 28,

1949 (Tr. 12), and that said Attorney Clanton, after filing his appearance for Allen Crossley, proceeded with the case. John Lee was not a party to any of the proceedings and at no time were the original pleadings amended so as to make him a party to the suit.

(5) In the praecipe for trial court record for use in this appeal (Tr. 28, 30), Lee requested that the clerk of the Superior Court of Cook County include in the record (Tr. 29), any summons and services on John Lee, individually, or as executor, sole legatee, devisee, and heir of Allen Crossley; order amending original petition for partition to show that John Lee is named as party defendant individually or as executor, sole legatee, devisee, and heir of Allen Crossley. No such documents appear in the record of this case and the clerk of the Superior Court (Tr. 73), certified that the record is true, perfect and complete as of November 8, 1950, as per praecipe.

(6) No such summons issued for John Lee and the original complaint was not amended to show that he was a party to the suit. The first appearance of the name of John Lee in the record as a party is an amendment to the complaint of the plaintiffs filed January 24, 1950, which stated that Crossley died December 12, 1949; that John Lee, pursuant to a Will had been appointed executor; that John Lee is sole legatee, devisee and heir to Allen Crossley; that John Lee is a *necessary party* to this cause of action and pursuant to an order of court is made a party to the action and that John Lee is a resident of the City of Chicago, County of Cook and State of Illinois (Tr. 13).

(7) The record further shows that on January 20, 1950, an order was entered granting leave to plaintiff to file an amendment to the complaint making John Lee, who is executor and sole devisee of Allen Crossley, now deceased, a party defendant to this cause within five days and the

defendant was given five days thereafter to enter his appearance (Tr. 14). No summons was ordered to issue, or issued as required by statute (Civil Practice Act, Sec. 25) (Chap. 106, Partition, Par. 31A).

(8) On January 30, 1950, it appears that Richard A. Harewood, who had withdrawn from the case and Benjamin G. Clanton, who had substituted for Richard A. Harewood as attorney for Allen Crossley, filed an answer to the amendment to the complaint (Tr. 14) which admitted the death of Allen Crossley and the allegations of the amendment to the complaint. Neither of said attorneys had been retained by John Lee and had *no authority* to represent him in this suit (Tr. 62-63). No notice of any kind had been given to John Lee that an order had been entered by the court making him a party to the suit, nor that any answer or pleadings had been filed by the attorneys who purported to represent John Lee.

(9) Without any notice or knowledge to John Lee, a decree of partition was entered June 20, 1950 (Tr. 15-17), and a decree of sale (Tr. 17-19) was entered June 27, 1950. When John Lee received information that he would be dispossessed from his home, he retained his present attorneys who investigated the matter in July, 1950, and prepared the motion to vacate the decrees which had been entered after the death of Allen Crossley, and in his verified petition, John Lee stated facts showing that he had no knowledge of the proceedings concerning the entry of the decrees; had not retained or consulted any attorney, Harewood or Clanton; had not ratified any of their acts and requested the court to hear his petition in order that he could establish the facts alleged therein (Tr. 55-64, the verified petition of John Lee).

(10) The hearing being set on the petition of John Lee for August 1, 1950, a record of the proceedings shows that

his petition was stricken and an order entered denying the same without a hearing; that he was denied the right to introduce any evidence to support the allegations of his petition (Tr. 31, 37, 39, 45, 46, 47, 49).

(11) When the date for the hearing on the verified petition on John Lee and the purported answer of the plaintiffs came on for hearing, the vital questions presented were that "John Lee had not consented to any attorney to represent him, had no knowledge or notice that he had been made a party to the suit after the death of his uncle, December 12, 1949; had no opportunity to be heard or present any defense, had not authorized any attorney to appear and represent him, had not ratified any act of attorneys purported to represent him in this suit; his property had been taken from him by the decree in partition entered by the Superior Court of Cook County, June 20, 1950, and was given to another contrary to the settled modes and usages without notice and an opportunity for a hearing, and that John Lee was entitled to be heard on his petition which alleged the above-stated facts showing his claim to the property and that his property had been taken from him without due process of law in violation of Article 2, Section 2 of the Illinois Constitution and the 14th Amendment of the Federal Constitution by the striking of his petition without a hearing, the refusal to hear evidence in support of his petition and the denial of his petition without a hearing.

(12) An appeal was taken from the decree of partition, the decree of sale and the order of August 1, 1950, denying the petition of John Lee, to vacate the decree of partition and decree of sale; denying John Lee as executor of the estate of Allen Crossley, the right to be heard and the relief prayed for in his petition, claiming that the proceedings of the Superior Court violated the rights of the

said John Lee, Article II, Sec. 2, of the Illinois Constitution, the 14th Amendment, Sec. 1, of the Federal Constitution as the said proceedings deprived him of his property without notice and hearing. This appeal was perfected by the serving and filing of a Notice of Appeal, August 3, 1950, with proof of service (Tr. 26-27). This is the requirement of the Civil Practice Act of Illinois (Chap. 110, Ill. Revis. Statute 1949, Par. 198, Civil Practice Act, Par. 74) which appeal removed the case from the Superior Court of Cook County to the Supreme Court of Illinois. A praecipe for trial court record for use in the Supreme Court of Illinois was served and filed August 14, 1950 (Tr. 28-30). This praecipe requested a report of all proceedings as shown by the record or file in this cause. No report of the Master in Chancery, to whom the case had been referred, and no testimony of witnesses attached to the report of the Master in Chancery had been filed in said cause on the date the appeal was perfected. A certificate of the Clerk of the Superior Court of Cook County showing that the Master's report and report of proceedings attached thereto, were not filed until October 28, 1950, more than two and one-half months after the appeal was taken and perfected, and more than three months after the decree in partition had been entered. (See Appendix I-III.) This certificate is for the purpose of showing that no Master's Report was on file when the decree of July 20, 1950 was entered in this cause, and should not have been considered by the Supreme Court on the appeal.

(13) The Supreme Court affirmed the Order of the Superior Court entered August 1, 1950, and rendered its opinion (Tr. 76-78) which stated that John Lee claimed he was deprived of his property without "due process of law" in violation of the state and federal constitutions, in that his property was taken from him without any notice

and without an opportunity to be heard (Tr. 77). The opinion recites that the facts as disclosed by the record shows that certain testimony was heard, upon which the Supreme Court based its conclusions (Tr. 78). It appears that the Supreme Court was under a misapprehension as to the state of the record, as no facts were shown by the record on the appeal as any testimony or evidence concerning the facts relied upon by the Supreme Court of Illinois were contained in the report of proceedings attached to the Master's Report which were no part of the record or appeal.

(14) The Petitioner, in his petition for re-hearing which was denied September 17, 1951, called to the attention of the Supreme Court the fact that no Master's Report and report of proceedings attached thereto, were on file at the time the decree in partition was entered July 20, 1951, or August 3, 1950, when the appeal was taken. The Petitioner, claiming his rights as guaranteed by the 14th Amendment, Section 1, the due process of law and the denial of the equal protection of the laws had been denied him by the proceedings in the Superior Court of Cook County, and the Supreme Court of the State of Illinois, now brings this petition, respectfully requesting this Honorable Court to grant him relief.

The Opinion Below.

The opinion of the Supreme Court of Illinois is reported —*Finley* v. *Crossley,* at 100 N. E. (2) 606, 409 Ill. 435.

Jurisdiction.

The judgment of the Supreme Court of Illinois was entered May 24, 1951 (R. 74). On September 17, 1951, a petition for rehearing was denied.

The jurisdiction of this Court is invoked under the provisions of Sec. 1254 (1) of the Judicial Code, as revised by Act of June 25, 1948 (28 U.S.C.A. § 1254) and Rule 12 (1) of the Supreme Court Rules.

Jurisdictional Statement.

The question concerning the deprivation of the petitioner of his property without notice and without an opportunity to be heard, claiming that such procedure was in violation of his constitutional rights under Art. 2, Sec. 2 of the Illinois Constitution and Sec. 1 of the 14th Amendment of the Constitution of the United States was first raised in the Superior Court of Cook County in the verified petition filed by the petitioner July 20, 1950 (Tr. 55-64). The petition, among other things, alleged (Tr. 56) (par. 1):

> "1. That he is a native born citizen of the United States of America, and as such citizen, he is entitled to all rights, privileges, and immunities guaranteed by the Constitution of the United States and the State of Illinois, in which state he now resides, and has resided since 1946."

The petition also alleges (Tr. 58, Par. 9):

> "That this petitioner by the proceedings in the instant case has been deprived of his property in violation of Article 2, Section 2 of the Illinois Constitution, and the 14th Amendment of the United States Constitution, in that he has been denied due process of law and the equal protection of the law as guaranteed by the said Constitution."

The petition also alleges (Tr. 62-63, Par. 19):

> "That all of the parties to this suit well knew that the said Allen Crossley was deceased as of December 12, 1949, and that an estate was pending in the Probate Court of Cook County as herein mentioned, and that your petitioner was and is the executor, legatee

and devisee of the said Allen Crossley; that the pleadings in this cause were not amended so as to charge your petitioner with any facts in issue in said cause. No summons were issued for your petitioner, although he resided in the City of Chicago, and no answer was filed in said proceedings to the complaint for partition by anyone on behalf of the said John Lee. That he received no notice that he had been made a party to the instant suit. That he did not retain any attorney to represent him in the instant suit, and that he was not given an opportunity for a hearing as shown by the record in said cause. That the proceedings of record show that your petitioner has been deprived of his property without due notice and hearing as guaranteed by Article 2, Section 2 of the Illinois Constitution and Amendment 14, Section 1 of the Federal Constitution."

In the Notice of Appeal and Proof of Service filed August 3, 1950 (Tr. 26-27, Par. 3) states:

"The order of August 1, 1950 denying the petition of the said John Lee to vacate the decree of partition entered June 20, 1950; to vacate the decree of sale entered June 27, 1950; denying the said John Lee, as executor of the estate of Allen Crossley, the right to be heard and to the relief prayed for in said petition of the said John Lee filed July 20, 1950, all of which denials violated the rights of said John Lee under Article 2, Section 2 of the Illinois Constitution; the 14th Amendment, Section 1 of the Federal Constitution and deprived him of his property without notice and hearing."

In lieu of assignment of errors, the Civil Practice Act of Illinois provides for Errors Relied Upon for Reversal to be set forth in the Brief and Argument for appellant, which shows that one of the errors relied upon for reversal by appellant as shown by his Brief and Argument (Page 7) is as follows:

"The answer to the other plaintiffs to the verified petition of John Lee was insufficient in law (Abst.

21-25), and it was error for the court to strike the verified petition of John Lee on the pretense that court was treating the motion to strike the said answer of plaintiffs as a demurrer while admitting that John Lee, in his verified petition, alleged that he did not employ any counsel to represent him (Abst. 46-47). John Lee was deprived of his property without the due process of law in violation of Article 2, Section 2 of the Illinois Constitution and Section 1 of the 14th Amendment of the Federal Constitution because his property was taken from him without any notice and without an opportunity to be heard and given to other persons."

Under the Points and Authorities contained in the Brief for the appellant while in the Supreme Court of Illinois (Page 10) the Federal Constitutional right of the petitioner was again claimed, in words and figures to-wit:

> "The court, in striking the verified petition of John Lee and denying him a hearing, was the taking of his property without due process of law in violation of Article 2, Section 2 of the Illinois Constitution and the 14th Amendment of the Federal Constitution, it was the taking of his property in violation of equal protection of the laws as guaranteed by the 14th Amendment of the Federal Constitution and giving it to another contrary to the settled modes of procedure and without an opportunity for a full and fair hearing by the person whose property is being taken."

This point was argued in the Brief and Argument of Appellant (PP. 32-35).

The Opinion of the Supreme Court of Illinois (Tr. 77) recognizes the claim of the petitioner that he was being deprived of his constitutional rights under Section 1 of the 14th Amendment in being denied the "due process of law" and the "equal protection of the laws" as shown by the Opinion, which is as follows (Tr. 77):

> "It is the contention of appellant that although he was named as a party to the suit he was not served

with summons as required by Section 25 of the Civil Practice Act, (Ill. Rev. Stat. 1949, Chap. 110, Par. 149,) and did not voluntarily enter an appearance in the cause until he filed his petition to vacate the decree of partition and sale, and that counsel who filed a purported answer in his behalf had no authority to represent him. Appellant contends further that he was deprived of his property without due process of law in violation of the State and Federal constitutions in that his property was taken from him without any notice and without an opportunity to be heard."

The affirmance of the judgment of the Supreme Court was a denial of the constitutional rights claimed by the petitioner under the 14th Amendment to the United States Constitution.

In the Petition for Rehearing filed in the Supreme Court of Illinois on June 16, 1951, the petitioner claimed that the decree entered in the Superior Court of Illinois and affirmed by the Supreme Court, without being based upon any evidence, was void, and the appellant, in his Petition for Rehearing (Tr. 89) which shows as follows:

"This Court's attention is called to the fact that no report of the Master was signed, approved or ordered filed until October 28, 1950, *nunc pro tunc* October 13, 1950—*three months* after the decree for partition had been entered, which decree recited that it was upon a *"report of the Master in Chancery, to whom this cause was heretofore referred to take proofs herein"* when the record shows that *no* Master's report was filed until October 21, 1950 (Rec. 130, 131) and approved October 28, 1950 (Rec. 256), by order of Court. The transcript of record further shows that no report of the Master had been approved and filed on or before August 3, 1950 when this appeal was perfected (Abst. 26-27) and is not a part of the record in this appeal and reference to a document not on file at the time of the perfection of the appeal can not legally be considered by this Court. A decree entered without any evidence is void and deprives the party against whom it is entered of the due process of law as guar-

anteed by Article 2, Section 2, Illinois Constitution and Section 1 of the 14th Amendment of the Federal Constitution and denies due process of the law as inhibited by said Section 1, Fourteenth Amendment of the Federal Constitution, and this Court should have so decided. We believe this principle of law to be elementary."

Again, the petitioner claims his constitutional rights under Section 1 of the 14th Amendment of the United States Constitution were being violated, and at page 90 (Tr.) states:

"Did the trial Court err in striking the verified petition of John Lee, on the Court's own motion and denying John Lee a hearing as to whether or not he had retained Mr. Harewood and Mr. Clanton to represent him in the trial Court and thereby violate the rights of John Lee, as guaranteed to him by the 'due process of law' provision of Article 2, Section 2, Illinois Constitution and Section 1, Fourteenth Amendment of the Federal Constitution and also deny to John Lee the equal protection of the laws as guaranteed by Section 1, Fourteenth Amendment of the Federal Constitution?"

Again, the petitioner claims his constitutional rights under the Fourteenth Amendment of the United States Constitution were being violated which claim is shown (Tr. 92) where it is stated:

"* * * The least the trial Court should have done was to make an inquiry concerning the truth or falsity of the allegation and we believe it to be the duty of this court to grant this petition for rehearing and to reverse the order of the trial Court with directions that John Lee be given his day in court and permitted to present evidence to establish the allegation of his verified petition. Anything less than a hearing, we believe, is a violation of the constitutional rights under both the State and Federal Constitutions, and we respectfully request this Court to grant this petition for rehearing; to reverse the order of dismissal and re-

mand the cause with directions or to so modify its opinion and state that the denial of the right of John Lee to be heard in the trial court violated his constitutional right under the Fourteenth Amendment. The opinion states that constitutional questions were raised and argued."

Again it is shown on (Tr. 96-97):

"• • • The denial by the trial court of the petition to vacate the decree of partition and the denial of a hearing to John Lee on the petition was a violation of the constitutional rights of John Lee in denying to him the 'due process of law' in violation of Article 2, Sec. 2 of the Illinois Constitution, Sec. 1, Fourteenth Amendment of the United States Constitution and did deny to John Lee 'the equal protection of the laws' in violation of the last mentioned section of the Federal Constitution. This constitutional question having been directly raised and argued throughout these proceedings by John Lee, in his effort to obtain his day in court, should have been decided by this Honorable court and must have been overlooked (see points and authorities, brief and argument for appellant, p. 10, argument, pp. 32-35). • • •"

The federal constitutional rights of petitioner were again claimed in the Petition for Rehearing (Tr. 104), where it is stated as follows:

"The importance of the question raised in the instant case we submit is sufficient to be given grave consideration, therefore, we have endeavored to fully present to this Honorable Court a clear picture of the situation for the purpose of showing that the denial of a hearing to John Lee by the Trial Court in the state of the record, was contrary to the fundamental principles of American jurisprudence, contrary to the settled usages and modes of procedure, a direct disregard by the Trial Court of the Constitutional rights of John Lee under the State and Federal Constitutions all of which require that, no man shall be divested of his property by taking it from him and giving it to another, without notice and an opportunity to be heard."

Again it is shown on (Tr. 114):

> "* * * An affirmance of the decree and judgment and the order dismissing the petition of John Lee to vacate the judgment and decree, after denying him the right to be heard is a plain violation of his constitutional rights under the state and federal constitutions. * * *"

This is a case arising under the Constitution and laws of the United States and the court's decision depends upon the construction of Section 1 of the 14th Amendment of the Constitution of the United States, because the claim of John Lee that his rights under the "due process of law" and "the equal protection of the laws" were defeated by the construction of the Constitution, in the proceedings in the Superior Court of Cook County, where his verified petition to vacate the decree which was entered without notice to him and without an opportunity to be heard and the affirmance by the Supreme Court of Illinois, of the order of the Superior Court of Cook County, striking his petition, without a hearing and denying him a hearing on the same, was a further denial of his Constitutional Rights under the 14th Amendment of the Constitution of the United States. This position is fully sustained by this Honorable Court in *Macon Grocery Company* v. *Atlantic Coast Line Railroad Company,* 215 U. S. 501, 506, 507, 508, in which case at page 506, the Court quotes from *Patton* v. *Brady,* 184 U. S. 608, 611 and states "It was said by Chief Justice Marshall that 'a case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either, *Cohen* v. *Virginia,* 6 Wheat. 264, 379; and again, when the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by

the opposite construction'. *Osborne* v. *Bank of United States,* 9 Wheat. 738, 822. See also *Gold-Washing & Water Company* v. *Keyes,* 96 U. S. 199, 201; *Tennessee* v. *Davis,* 100 U. S. 257; *White* v. *Greenhow,* 114 U. S. 307; *Railroad Company* v. *Mississippi,* 102 U. S. 135, 139".

Questions Presented.

The questions presented herein include the following:

1. Did the Supreme Court of Illinois in affirming the order of the Superior Court of Cook County, striking the petition of John Lee to vacate the decree of partition entered June 20, 1950 and entering an order denying relief to John Lee without a hearing, deny John Lee the "due process of law" and "the equal protection of the laws" as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States and thereby prevent the said John Lee from receiving a fair trial?

2. The Superior Court of Cook County recited in its decree that it based said decree on the Master's report when there was no Master's report of record at the time the decree was entered and the misapprehension of the Supreme Court of Illinois as shown in its opinion which recited the record showed certain evidence when in fact, there was no such evidence in the record and it being shown that the Master's report and testimony was not filed until many months after the decree and after the denial of the petition of John Lee. Did this misapprehension as to the state of the record by the Superior Court of Cook County and by the Supreme Court of the State of Illinois, deprive John Lee of the "due process of law" as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States, and prevent him from receiving a fair trial?

3. The record on its face discloses a total want of jurisdiction of the Superior Court of Cook County of the person of John Lee, in that he was not served with process of any kind or given any notice as required by the laws of the State of Illinois; a total lack

of jurisdiction of the subject matter in that the original complaint did not conform to the special statute governing partition proceedings, did not contain any allegations of fact against John Lee and was not at any time amended so as to charge any facts against John Lee; a total lack of jurisdiction to enter a decree without any evidence or default against John Lee, and the decree was not in accordance with the partition statute of the State of Illinois; in the state of the record did the Supreme Court of Illinois in affirming the order of the Superior Court of Cook County, deprive the petitioner of the "due process of law" and the "equal protection of the laws" as guaranteed by Section 1 of the 14th Amendmen of the Constitution of the United States and prevent him from receiving a fair trial?

Reasons Relied Upon for the Allowance of This Petition.

It is believed that the Writ should be granted in this case for the following reasons:

1. The Supreme Court of Illinois in affirming the order of the Superior Court of Cook County misapprehended the state of the record and based its decision, as shown by the opinion, upon matters not appearing in the record and thereby the petitioner was deprived of the "due process of law" and the "equal protection of the laws" as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States and thereby prevented the petitioner from receiving a fair trial.

2. The Superior Court of Cook County in misapprehending the state of the record and without any evidence, arbitrarily denied the petition of John Lee to vacate the decrees, which had been entered against him without notice and without an opportunity to be heard and thereby denied to the petitioner the "due process of law" and "equal protection of the laws" as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States and thereby prevented the petitioner from receiving a fair trial. The affirmance by the Supreme Court of Illinois of the

order of the Superior Court of Cook County was a denial of the constitutional rights claimed by John Lee under Section 1 of the 14th Amendment of the Constitution of the United States.

3. John Lee claimed his right to a fair trial and the right not to be divested of his property without notice and an opportunity to be heard as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States; his claim was denied by the Superior Court of Cook County and the Supreme Court of Illinois by a misconstruction of the 14th Amendment of the Constitution of the United States and this court, alone, may grant him relief.

4. The petitioner was not named a party in the original proceedings and the complaint fails to allege facts against him and was at no time amended so as to allege any facts to which he could take issue; he was found to be an indispensable party to the proceedings and was brought in as a party-defendant after the death of the original defendant; no summons was issued against him, no notice was given to him that he had been made a party-defendant; he retained no attorney to represent him in the proceedings; he did not file an appearance before the entry of the decrees; he was in possession of the property involved in the case, under the claim of ownership; the decrees affected his property and he was ordered to be divested of this property by the decrees; there was no evidence appearing in the record at the time the decrees were entered and at the time the appeal was taken from the order striking his petition and motion to vacate the decrees; and that upon receiving information that the decrees had been entered against him involving his property he immediately called the attention of the trial court to the fact that he had not been served with process or notice of any kind, had not retained any lawyer to represent him and had no knowledge that any attorney pretended to represent him. The court without hearing any evidence in support of his petition, struck the petition and denied him relief. This proceeding was contrary to the legal course of judicial proceedings, contrary to the elementary principles of jurisprudence in all civilized countries, contrary to the

first principles of the social compact of the right administration of justice, in that it takes the property of one person and gives it to another without notice and an opportunity to be heard, and it is therefore important that this honorable court will grant this application.

Specifications of Errors Relied On for Reversal.

The Supreme Court of Illinois erred in affirming the order of the trial court which struck the petition of John Lee, without a hearing and denied the relief prayed for in said petition which relief was to vacate the decrees entered without notice and without an opportunity of John Lee to be heard and which divested him of his home in violation of the "due process of law" and "equal protection of the laws" as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States; he claimed his constitutional rights in the Superior Court of Cook County and in the Supreme Court of the State of Illinois as fully set forth in this petition under "JURISDICTION."

Conclusion.

For the foregoing reasons, the petitioner respectfully submits that this case presents a situation of such importance, not only to him as an individual, but to the millions of present and future litigants, as to call for the exercise by this Court in its sound judicial discretion, of its power to review the decision of the court below, and he therefore prays that a writ of certiorari to the Supreme Court of the State of Illinois be allowed in this case, and that, on such review by this Court, the judgment of the Supreme Court of the State of Illinois be reversed in its entirety or reversed and remanded with appropriate directions.

JOHN LEE,
Petitioner.

By.....
RICHARD E. WESTBROOKS,
3000 South State Street,
Chicago 16, Illinois,
Counsel for Petitioner.

Dated: 14th Day of November, A. D. 1951.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

In order to avoid unnecessary repetition, the foregoing petition for the writ is hereby by reference incorporated into this supporting brief.

ARGUMENT.

I.

This is a case arising under the Constitution and Laws of the United States.

In the case at bar the Petitioner claimed that the proceedings in the trial court deprived him of his constitutional rights as guaranteed by Section 2, Article 2 of the Constitution of the State of Illinois and Section 1 of the 14th Amendment of the Constitution of the United States, in this, that he had been deprived of his property consisting of real estate upon which his residence was located and in which he resided, without notice and without an opportunity to be heard. He claimed that by the proceedings in the Superior Court of Cook County, the decree in partition was void. His petition to vacate the decree alleged that he is a native-born American citizen and entitled to all rights, privileges and immunities guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States (Tr. 56); that his present residence is 4612 South Dearborn Street, Chicago, Illinois, where he had resided for many years prior to the death of his uncle, Allen Crossley, deceased, and was residing with his uncle December 12, 1949, on which date his uncle died, leaving a Will appointing the Petitioner as Executor and naming him the sole Legatee, devisee and heir to the estate of the said deceased, and had inherited the property involved in this suit from the deceased; that without notice and an opportunity to be heard a decree of partition was entered divesting him of all right, title and interest in his said property (Tr. 62-63).

Upon receiving information that he was to be dispossessed under the decree and within thirty days from the date of the decree he filed a petition to vacate the decree setting forth the facts as above stated and in addition thereto alleged that he had not been represented by counsel during the proceedings. The Superior Court of Cook County struck his petition without a hearing (Tr. 46-47) and entered an order denying the petition (Tr. 19-20).

The Supreme Court of Illinois affirmed the order of the Superior Court on a misapprehension of the state of the record. This misapprehension will be later developed.

We believe it to be unnecessary to do more than call to the attention of this Court the case of *Macon Grocery Company* v. *Atlantic Coast Line Railway Company,* 215 U. S. 501, 506, 507, 508 (54 L. Ed. 300, 303), in which case at page 506 the Court quotes from *Patton* v. *Brady,* 184, U. S. 608, 611 and states "It was said by Chief Justice Marshall that 'a case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either' (*Cohen* v. *Virginia,* 6 Wheat. 264, 379) and again, when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction' *Osborne* v. *Bank of United States,* 9 Wheat. 738, 822. See also *Gold-Washing & Water Company* v. *Keyes,* 96 U. S. 199, 201; *Tennessee* v. *Davis,* 100 U. S. 257; *White* v. *Greenhow,* 114 U. S. 307; *Railroad Company* v. *Mississippi,* 102 U. S. 135, 139."

II.

The striking of the verified petition of John Lee, which was in support of his motion to vacate the decree in petition and the decree of sale was arbitrarily done without a hearing, and deprived the petitioner of the due process of law and the equal protection of the laws as guaranteed by Section One of the 14th Amendment of the Constitution of the United States and prevented him from receiving a fair trial.

The verified petition of John Lee alleged that he had not been served with any process, had received no notice that he had been made a party to the pending suit, had not retained an attorney to represent him and had no knowledge that any attorneys claimed to represent him by filing an answer to the amendment to the complaint of plaintiffs (Tr. 14), which was not signed by John Lee or anyone authorized by him to file same. This Honorable Court has held such procedure to be contrary to the principles of the social compact of the right administration of justice and reversed a case in which the answer of an alien had been stricken and he was denied the right to defend.

In *McVeigh* v. *United States,* 78 U. S. (11 Wall.) 259, a trial court had stricken the pleadings of an alien who had been sued in the District Court, thereby denying him an opportunity to defend as guaranteed by the Constitution of the United States which prohibits the taking of one's property without due process of law. The Supreme Court of the United States, in reversing the judgment of forfeiture of property, entered against the alien, states (p. 267):

> "In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are

unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact of the right administration of justice."

In the case at bar, a mere reading of the transcript shows that the trial court refused to grant the appellant a hearing on his petition and when it was called to the attention of the trial court that the answer of the plaintiffs was insufficient in law, the petition of the appellant was stricken and an order entered denying his petition without a hearing (Tr. 46-47).

The Supreme Court of Illinois in a case in which a party had been brought in court and whose property was to be taken was denied the right to be heard and In Re: Estate of Rackliffe, 366, Illinois, 22, the court states (p. 26):

> "It is an elementary principle of jurisprudence in all civilized countries that before property or liberty may be taken from an individual he shall have an opportunity to be heard on charges brought against him. This is a rule so universal in its application to all common law, chancery or statutory proceedings that there is general agreement that no court has power otherwise to divest a person of property or punish him. In fact their recognition of that basic principle of justice is so widespread that courts are now seldom called upon to restore rights of individuals so ruthlessly taken from them (*Leininger* v. *Reichle,* 317 Ill. 625; *Heppe* v. *Szczepanski,* 209 id. 88; *Botsford* v. *O'Connor,* 57 id. 72)."

In *Gray* v. *National Bank of Chicago,* 388 Ill. 124, 129, the Supreme Court in holding that the trial court had no

jurisdiction of the person of a defendant who had not been served a summons, had not voluntarily entered his appearance and had not retained any attorneys to represent her in the case, had not consented or confirmed the actions of the said attorneys, and where the attorneys claimed they were under a misapprehension that they were representing the defendant and had accepted copies of the pleadings, motions and briefs filed by the opposite parties to the suit, and on three separate occasions had joined in a stipulation of parties fixing time for filing pleadings and briefs in the case and had performed other services under the misapprehension that they were representing the defendant, although they had not been retained by the defendant such actions of the attorneys were unauthorized and rendered a judgment against the defendant void for want of jurisdiction. It was further held that when this matter was brought to the attention of the trial court a hearing was the proper method of determining the claim that the attorneys had not been retained and at Page 129 states:

> "Regardless of the attorney's conduct there remains the fact that there is no proof that Ina Gray Cook authorized the Weinberg Firm to appear for her in this suit. It is true that where an attorney appears of record for a party, the presumption is that his appearance in such a capacity was duly authorized by the person for whom he is appearing. However, it is not a conclusive presumption, and when the facts show a lack of authorization, express or implied, and there is no proof of ratification, the acts of counsel are a nullity as against the party for whom the appearance was entered." (Citing cases.)

This matter was called to the attention of the trial court. As a penalty for making a motion to strike the answer of the plaintiffs to the verified petition of John Lee, because of its insufficiency, the court arbitrarily struck the verified petition, although the court admitted that the question of

whether or not John Lee employed Attorneys Clanton and Harewood was important (Tr. 46-47).

When the court was pressed for a ruling on the sufficiency of the plaintiffs' answer to John Lee's verified petition, the court admitted that the answer was insufficient (Tr. 45), but finally stated (Tr. 46):

> "The Court: Well, I am going to carry the demurrer back and strike the petition. The only thing in here that seems to have any place according to your own statement, Mr. Westbrooks, he did not employ an attorney. And, in the rest of your petition you are seeking to repeat the case. I am going to strike the petition.
>
> Mr. Westbrooks: No more demurrers?
>
> The Court: I use that term, you know what I mean, the petition and answer."

The right to notice and to a hearing in all courts is fundamental and a total lack of notice and a denial of a hearing when properly brought to the attention of the court, as shown by the record, entitles the appellant that the order of the court be reversed with directions that the appellant be given his day in court. To ignore these fundamental rights is to deny the petitioner the due process of law and the equal protection of the laws as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States and did prevent the petitioner from receiving a fair trial.

It is not disputed but admitted by the plaintiffs that the petitioner, John Lee, was a necessary party to the cause of action in the Superior Court. This is shown by the amendment to the complaint of the plaintiffs (Tr. 13), and he was made a party defendant to the action, without notice to him, by an order entered on motion of attorney for plaintiffs (Tr. 14). No process was issued or served

on the petitioner, John Lee, and he had no notice that he had been made a party to the suit until after the entry of the decree in petition, July 20, 1950 and immediately upon receiving information that a decree had been entered affecting his property he filed his petition to vacate the decree and alleged that he had no notice or knowledge that he had been made a party defendant to the suit, had not retained an attorney to represent him, that no attorney was authorized to represent him prior to the entry of the decree and that he had not confirmed the acts of any attorney who pretended to represent him and prayed that a hearing he had in the Superior Court on his verified petition. He also claimed that the proceedings without notice to him and without an opportunity to be heard deprived him of the "due process of law" and the "equal protection of the laws" as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States. The court struck his petition, and denied the same without any hearing, although under the laws of the State of Illinois it was the duty of the court to inquire into the facts alleged in the verified petition which brought to the attention of the court the fact that the petitioner was a necessary party and interested in the subject matter. This question is succinctly stated in *Oglesby* v. *Springfield Marine Bank,* 385 Ill. 414, at 423:

> "It is a general rule of equity that all persons should be made parties who are legally or beneficially interested in the subject matter of the litigation, and who will be affected by the decree, so as to enable the court to dispose of the whole controversy (*Riley* v. *Webb,* 272 Ill. 537). If the lack of parties is brought to the attention of the court, be it one of original or appellate jurisdiction, the court should not proceed further in the matter until the omission has been corrected, even though no objection is made by any party litigant * * *. The objection may be made by a party at the hearing, or on appeal or error, and the court will

upon its own motion, take notice of the omission and require the omitted party to be made a party," etc.

John Lee acted as could be expected of any reasonable person. He had no assertable interest in the litigation until after the death of his uncle, Allen Crossley, and could not have reasonably participated in the litigation during the lifetime of his uncle. It is admitted on the record that the plaintiffs' attorney, acting for the plaintiffs, knew of the death of Allen Crossley, and of the Will filed in the Probate Court of Cook County, making John Lee the executor, sole legatee and devisee, and further knew that John Lee was the nephew of Allen Crossley, deceased, and therefore that John Lee had an interest in the real estate mentioned. The plaintiffs' attorney further knew that the Civil Practice Act provided the proper method of bringing in new parties and further knew that it was necessary to give notice to the said John Lee of any proceedings in which he was to be made a party.

The objection that a necessary and indispensable party has been omitted may be raised on the court's own motion on appeal or error and the court should proceed no further until the omission has been corrected. The verified petition of the appellant brought to the trial court's attention his omission as a party to the litigation, but the court again disregarded the law as stated by the Supreme Court of Illinois in a long, unbroken line of authorities. *Oglesby* v. *Springfield Marine Bank,* 385 Ill. 414-423. The mere fact that the court may decide the issues against the necessary and indispensable party is no excuse to deny him the right to be heard, and in *Oglesby* v. *Springfield Marine Bank,* 385 Ill. 414, 426, the Supreme Court again states:

> "The mere fact that the court decides the issues in such a way that the absent parties have no interest in the subject matter of the suit does not control. Such parties, if they have, or might claim, a substan-

tial and present interest, under the issues involved, are entitled to be heard. They are entitled to be present and to participate in the litigation of all questions affecting such interest. Here it was claimed that the omitted parties were beneficiaries of the trust sought to be established by appellants."

It is admitted by the amendment to the plaintiffs' complaint that the appellant, John Lee, had, or claimed to have had, a substantial interest in the real estate, and he was entitled to be present and participate in the litigation. This appeal is limited from the ruling of the trial court in striking the verified petition of John Lee, and entering an order denying the same without any hearing of evidence which was offered by John Lee on August 1, 1950.

Under the circumstances as disclosed in this petition and the law as stated in this brief the affirmance of the judgment by the Supreme Court of Illinois denied to the petitioner the "due process of law" and the "equal protection of the laws" as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

III.

The misapprehension of the Superior Court of Cook County as shown by the recital in the decree in petition entered June 20, 1950, and the misapprehension of the Supreme Court of Illinois as shown by its Opinion rendered May 24, 1951, as to the existence in the record of certain facts which did not appear in the record deprived the petitioner of the due process of law as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States and prevented him receiving a fair trial.

The Decree in Petition (Tr. 15) recites:

"This cause coming on to be heard upon the complaint herein, the *Answers* of the *Defendants* thereto,

> . . . the Report of the *Master in Chancery* to whom this cause was heretofore referred to take the proofs herein, which report is hereby approved and confirmed by this Court and the exceptions of the defendants to the Master's Report."

The record shows that at the time this decree was entered there was no Master's Report on file, no proofs taken before the Master because it is shown by the certificate of the Clerk (Appendix II, III) that no Master's Report or proofs were filed and approved by the Court until October 28, 1950, which is more than three months after the entry of the decree. When it is considered, as shown by the record, that no summons was at any time issued or served on the petitioner, he did not file any appearance and had not retained any attorney to file any appearance for him and was not represented by counsel prior to the entry of the decree, it can readily be understood how the Court could have misapprehended the fact that the Report of the Master in Chancery or proofs taken before him were on file at the time the decree was entered. Had the petitioner been represented by counsel he would have called to the attention of the Court that no Report of the Master or proofs taken before the Master were on file.

The opinion of the Supreme Court of Illinois recites (Tr. 77):

> "It is the contention of appellant that although he was named as a party to the suit, he was not served with summons as required by Section 25 of the Civil Practice Act (Ill. Rev. Stat. 1949, chap. 110, par. 149), and did not voluntarily enter an appearance in the cause until he filed the petition to vacate the decree of partition and sale, and that counsel who filed a purported answer in his behalf had no authority to represent him. The appellant contends further that he was deprived of his property without due process of law in violation of the State and Federal Constitutions in that his property was taken from him without any notice and without an opportunity to be heard . . . (Tr. 78).

> The facts that, as the record discloses, the attorneys who represented the original defendant, Allen Crossley, after his death filed an answer on behalf of appellant, and testified in appellant's presence, without any objection of appellant, that they were acting for and on appellant's behalf, seems sufficient to warrant the presumption that the appearance of counsel was authorized by appellant.
>
> We are of the opinion, after a careful analysis of this record, that the facts as shown were sufficient to justify the lower court in striking the petition of appellant. The order is, therefore, affirmed."

It is a bit unusual to be compelled to obtain a certificate of the Clerk of the trial court to show the time of the filing of certain papers in a case. The misapprehension of both the trial court and the Supreme Court of Illinois, that the Report of the Master to which was attached certain evidence heard before him, was on file at the time the decree was entered and the appeal taken in this case, when in fact that such was not the case, it became necessary to obtain the certificate of the Clerk of the Superior Court of Cook County to show the exact date of the filing of the Report of the Master and the proofs taken before him attached to said report (Appendix II, III). This shows that there was no Master's Report filed and approved in the Superior Court of Cook County until October 28, 1950, which was more than three months after July 20, 1950, the date of the Decree in Partition and more than two and one-half months after the Notice of Appeal was filed from the Order striking the petition of John Lee and denying the same without a hearing.

This Court in a recent opinion dealt with a similar situation and held that such misapprehension was lacking in due process and in *Townsend* v. *Burke,* Warden 334 U. S. 736, a case in which the Court had misapprehended the

existence of certain facts which did not appear in the record and had entered a judgment on such misapprehension, in reversing the judgment states (p. 740):

> "We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the Court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel (p. 741), this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with *due process of law*, and such a conviction cannot stand.
>
> . . . It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designated pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process. . . .
>
> In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from the prisoners."
>
> Reversed.

The Notice of Appeal was filed August 3, 1950, and there was no Master's Report or proofs attached thereto of record on the date the appeal was perfected, and the Superior Court of Cook County had no jurisdiction to enter the order October 28, 1950, approving the Master's Report and ordering the same field of record (Appendix III).

This question has been decided by the Supreme Court of Illinois in the recent case of *American Smelting and Refining Co.* v. *City of Chicago,* 409 Ill. 99; 98 N. E. 2d 710; *Brehn* v. *Piotrowski,* 409 Ill. 87, 98, N. E. 2d 726. In the *American Smelting and Refining Co.* v. *City of Chicago,* 98 N. E. 2d 710, the court states (p. 711):

> "Upon due consideration we held that when the *Notice of Appeal* is filed in the circuit court the case proceeds in the court of review, not as a new case but as the continuation of one that was pending in the trial court, and the jurisdiction of the reviewing court to take the case attaches when the Notice of Appeal is (p. 712) filed in the trial court, and that we have no jurisdiction to consider any proceedings of the lower court after Notice of Appeal was filed and served. We further held the only questions we could consider on appeal were those existing when the Notice of Appeal was filed. (Citing cases.)
>
> In view of the provisions of Section 76 of the Civil Practice Act, the holdings in these cases would seem to be academic. Prior to the adoption of the Civil Practice Act the same rule prevailed that when an appeal was perfected the trial court had no further jurisdiction until the appeal was disposed of. (Citing cases.)
>
> It necessarily follows that from the date of the filing and service of the Notice of Appeal, the cause is transferred to the Appellate Tribunal *and the trial court no longer has jurisdiction to enter any orders,* and consequently the record in the present case comes to this court without any certificate that the validity of an ordinance is involved and that the public interest required an appeal directly to the Supreme Court. . . .
>
> The Notice of Appeal deprives the trial court of jurisdiction of the subject matter, and of course, an order or judgment made without jurisdiction is void. *Rabbit* v. *Frank C. Webb & Co.,* 297 Ill. 491, 130 N. E. 787; *Herb* v. *Pitcairn,* 384 Ill. 237, 51 N. E. 2d 277; *Gottlieb* v. *Crowe,* 368 Ill. 88, 12 N. E. 2d 881."

The trial court and the Supreme Court of Illinois in considering any evidence contained in the Master's Report filed more than three months after the Notice of Appeal was served and filed in this cause, exceeded their jurisdiction and rendered the decree of the Superior Court void and the judgment and opinion of the Supreme Court of Illinois void. These void judgments deprived the petitioner of the due process of law and the equal protection of the laws as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States. We do not believe there is any dispute as to the date of the filing of the Master's Report and the proof attached thereto, therefore, the judgment of the Superior Court and the judgment and opinion of the Supreme Court of Illinois were entered without any evidence and are therefore void.

IV.

The Petitioner in being denied the due process of law and the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, was prevented from receiving a fair trial both in the Superior Court of Cook County and the Supreme Court of Illinois.

This Honorable Court in *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 1041, 57 L. Ed. 1427, defined the meaning of the term, "due process of law," and we will content ourselves with the quotation from the last-mentioned case which is as follows:

> "Whatever else may be uncertain about the definition of the term, 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, *and without notice or opportunity for a hearing.*"

We believe it only necessary to quote the opinion of this Honorable Court in *Powell* v. *Alabama,* 287 U. S. 45, 77 L. Ed. 158, 170, 1932 which seems to be applicable to the facts in the case at bar. This Honorable Court in *Powell* v. *Alabama,* 287 U. S. 45 at page 68 states:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in multitude of decisions. In *Holden* v. *Hardy,* 169 U. S. 366, 389, 42 L. Ed. 780, 790, 18 S. Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin* v. *Page,* 18 Wall, 350, 368, 369, 21 L. Ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

In Illinois the courts have defined the term "due process of law" and in *Northern Trust Co.* v. *Sanford, et al.,* 308 Ill. 381, 139 N. E. 603 the Supreme Court at page 607 states:

> "Due process of law in the regular course of judicial proceedings requires *notice to and service upon the defendant,* of the character required by law, before

> his property rights *may be divested by a decree of court.* It is not material that as a matter of grace or favor notice may have been given to him of the proposed proceedings in some manner not prescribed by law, but the real question in every case is, Has he had notice and service according to the law? and if not, his rights are not protected under our Constitution against any unwarranted service and notice, the same as *if* he had not received any notice whatever."

In the case at bar it appears from the recital in the decree of the Superior Court that a report of proceedings had been filed and considered by the court, when in fact the record shows that no report of proceedings and proofs attached thereto were on file when the decree was entered. The opinion of the Supreme Court of Illinois recites, that the facts of the record show certain conditions, when in fact there were no facts in the record as the report of the Master in Chancery and the proofs attached thereto were not filed until many months after the decree had been entered.

It is the settled law of the State of Illinois that the recital of jurisdictional facts, when rebutted by the record or is irreconcilable therewith is not conclusive and the recitals in the decree may be impeached by the record. *Hodgen, et al.* v. *Guttery,* 58 Ill. 431, 434; *Van Pelt* v. *Dunford, et al.,* 58 Ill. 145, 146; *People* v. *Shurtleff,* 355 Ill. 210, 220 where the court states:

> "The finding by court that it has jurisdiction in the case is always overcome when the finding is irreconcilable with the facts disclosed by the record. In such a case the record impeaches itself as it did in the case of *People* v. *Kelley, supra.*"

This same doctrine is sustained in *Oulvey* v. *Little,* 233 Ill. App. 553, 556, in which case the court states at page 556:

> "An examination of the decree in this connection discloses that its finding with reference to notice to plain-

> tiff in error is based on the certificate above mentioned. Nowhere in the decree does it appear that the court had before it or heard any other evidence oral or documentary, upon which to base its finding of jurisdiction, other than said certificate."

The certificate in the above case was held to be void and therefore the court had no jurisdiction to enter the decree.

It is obvious that the original complaint in partition did not contain any facts against John Lee and he was not named at any place in the complaint. There was no rule on John Lee to answer the original complaint and no default was taken against him. It is the settled law of Illinois that without allegations against the defendant there can be no proof or relief against him and any judgment rendered in such case is void. This is true although the party is made a defendant to a pending suit. *Veach* v. *Stegmeyer, et al.*, 233 Ill. App. 559, 564, 565.

The original complaint was not amended after John Lee was named as a party defendant, without notice to him and the decree involving his property is void. A similar question was decided in *Northern Trust Company* v. *Sanford, et al.*, 308 Ill. 381, 139 N. E. 603 at page 607 in which case a decree was reversed because the original complaint contained no allegations against the new party brought into a pending suit.

Conclusion.

Upon the foregoing premises, your petitioner prays that his petition be granted; that a writ of certiorari be issued and the case reviewed; that the judgment of the Supreme Court of Illinois will be reversed or reversed and remanded with directions to clarify any doubt about its decision denying the claim of the petitioner that he had been denied the due process of law and the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States and was prevented from receiving a fair trial.

Respectfully submitted,

JOHN LEE,

Petitioner.

By RICHARD E. WESTBROOKS,

His Attorney.

Chicago, Illinois, November 14, 1951.

APPENDIX.

PLACITA — SUPERIOR COURT OF COOK COUNTY ORDER.

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

PLEAS, before the Honorable Frank M. Padden, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court House, in the City of Chicago, in said County, and State, on the first Monday being the First day of October, in the year of our Lord, one thousand nine hundred and fifty-one, and of the Independence of the United States of America, the one hundred and seventy-sixth.

Present:

The Honorable Frank M. Padden, Judge of the Superior Court of Cook County.

John S. Boyle, State's Attorney.

John E. Babb, Sheriff of Cook County.

Attest: Henry Sonnenschein, Clerk.

Be it remembered, that heretofore, to-wit: on the 15th day of October, in the year of our Lord one thousand nine hundred and fifty-one, the same being one of the days of the October Term of the Superior Court of Cook County, the following among other proceedings were had in said Court and entered of record, to-wit:

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Superior Court of Cook County, Illinois.

I, Henry Sonnenschein, do hereby certify that I am the duly qualified, elected, and acting clerk of the Superior Court of Cook County, Illinois, and that by the laws of the State of Illinois, I am the keeper of all records, dockets, registers, and books belonging to the office of the Clerk of the Superior Court of Cook County; that I have diligently searched the dockets, registers, and papers in my office kept by me as a part of my official duty in the case of *Eula Lee Matthews Finley, and Henry P. Willimon* v. *Allen Crossley,* No. 49-S-426, lately pending in the Superior Court of Cook County, Illinois, and that the said record, docket, register, and files do not contain any entry or order of Court showing that the report of proceedings attached to the report of the Master in Chancery were filed in the said Superior Court of Cook County prior to October 21, 1950 and that no such report of proceedings attached to the report of the Master in Chancery were on file in the Superior Court of Cook County during the months of August, 1950 and September, 1950 and that the first entry of the filing of the said report of proceedings attached to the report of the Master in Chancery, filed in this cause, was October 21, 1950 and that the first and only order of Court entered in this cause, as appears from the records in my office in said cause, after the filing of the said report of proceedings attached to the report of the Master in Chancery in this cause appears in docket No. ....., page ....., which shows that the said reports of the Master in Chancery were filed October 21, 1950; that the order approving the said Master's report in this cause, as shown by the docket kept by me in this office of the Clerk of the Superior Court of Cook County, known as docket No. ....., page ....., is hereto attached to this certificate and shows that the same was entered October 28, 1950, and that no prior order, approving the said Master's report was entered in this cause, after the filing of the said Master's report and the report of proceedings attached thereto; that said order of October 28, 1950, is in words and figures to-wit:

Finley, et al., v. *Crossley*, No. 49-S-426.

Order.

On Motion of Attorney for Plaintiffs.

This cause coming on to be heard on the motion that the Master's report and report of proceedings before the Master be signed, settled, sealed, approved and ordered filed by the trial judge and it appearing to the court that this motion was continued and set for Saturday, October 28, 1950, at 9:30 A. M., without further notice and all parties of interest being present after due notice.

Ordered: That the Master's Report and report of proceedings had before said Master, presented by Isaac I. Bender, Attorney for plaintiffs, be and the same is hereby ordered signed, settled, sealed, approved and filed, Nunc pro tunc October 13, 1950.

Entered: FRANK M. PADDEN,
Judge.

Dated this the 28th day of October, 1950.

STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

I, Henry Sonnenschein, Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain ORDER, made and entered of record in said court in a certain cause LATELY pending in said Court on the CHANCERY side thereof, wherein EULA LEE MATTHEWS FINLEY, ET AL., WERE PLAINTIFFS, and ALLEN CROSSLEY, ET AL., WERE DEFENDANTS.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Chicago this 15th day of October, A. D. 1951.

(SEAL) /s/ Henry Sonnenschein, Clerk.